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Employers' Liability —Maritime Law— Constitutionality of State Statute Affecting General Maritime Law.

The decision of the Supreme Court of the United States in the case of *Southern Pac. Co.* v. *Jensen,* 37 S. Ct. 524, handed down May 21st (Advance Sheets Lawyers-Co-op. July 1, 1917, p. 525) is exceedingly interesting not only on account of the novelty of the case, but as well on account of the very able dissenting opinion of Holmes and Pitney, J. J., in which dissent *Brandeis* and *Clark,* J. J., unite. Justice Pitney's dissenting opinion covers nearly thirteen pages of the advance sheets, as against about four and a half pages of the opinion of the court delivered by Justice McReynolds: It does not, however, lose anything by its length for it is a very able, clear and powerful statement of the law, as in our humble opinion it should be. Mr. Justice Holmes' dissenting opinion whilst much shorter, is forceful and worthy of careful perusal.

The case in brief is this: The Southern Pacific Company is and was, when Jensen one of its employees was killed, a common carrier by railroad. It also owned and operated a steamship El Oriente plying between New York and Galveston. Whilst this steamship was discharging cargo in New York, Jensen, one of the employees of the Company was killed in the act of helping to unload the vessel. His killing was accidental; he was not intoxicated, he was on duty and there was no wilful intention on his part to bring about the injury which caused his death.

Under the law of the State of New York his widow and children were allowed compensation in the state court, the case having been twice appealed. See L. R. A. 1916A, Ann. Cas. 1916B. The Supreme Court of the United States in the deci-

sion herein referred to reversed the Supreme Court and the Court of Appeals of New York and held that the provisions of the New York Workmen's Campensation Act (N. Y. Laws 1913, Chap. 816; Laws 1914, Chaps. 41-316) which in lieu of the common-law liability enforceable by suit in cases of negligence imposes a liability upon employers enforceable without judicial action, to make compensation for disabling or fatal accidental injuries to employees without regard to fault as a cause, graduating compensation for disabilities according to a prescribed scale based upon loss of earning power and measuring death benefits according to the dependency of the surviving wife, husband or infant children, renders the statute to that extent invalid as conflicting with U. S. Const. art. 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction, U. S. Const. art. 1, § 8, giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the Federal government and U. S. Judicial Code, §§ 24, 256, giving Federal district courts exclusive judicial cognizance of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it, being also inconsistent with the policy of Congress to encourage investment in ships by U. S. Rev. Stats. §§ 4283-4285, etc., etc., etc., which declare a limitation upon the liability of their owners. The majority of the court holds that the United States has a maritime law of its own operative throughout the United States and that as this maritime law was in existence when the Constitution was adopted it was undoubtedly referred to in that instrument and could not have been intended to be left subject to the rules and regulations of the several states, as that would have defeated the uniformity and consistency at which the Constitution arrived on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states. The Lottawanna (*Rodd* v. *Heartt*, 21 Wall. 558). Justice McReynolds admits that it would be different if not impossible to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. He

cites several instances and cases, one of which, The Hamilton (Old Dominion S. S. Co. *v.* Gilmore, 207 U. S. 398) sustained the right to recover under the state law in case of death, but somewhat illogically it seems to us, the court holds that no state legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. For can there be any more uniformity in state laws allowing compensation in case of death than for injuries?

Justice Holmes' dissenting opinion is comparatively brief and in answer to Justice McReynolds' statement in the opinion of the court that, "the work of a stevedore (Jensen was a stevedore), in which the deceased was engaging is maritime in its nature" and that "the injuries which he received were likewise maritime," cites Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52, in which common-law principles were applied to sustain a libel by a stevedore in personam against the master of a vessel for personal injuries sustained while loading a ship. Justice Holmes is very farnk in saying "I recognize without hesitation that judges do and must legislate, but they can do so only *interstitially;* (italics ours) they are confined from molar to molecular motions."

Now we must insist that this, whilst evincing the clearest evidence of Boston culture, is mere *dictum* as is also the eloquent remarks of the same learned Justice. "The common law is not a brooding omni-presence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact."

But cutting out the fine writing, Justice Holmes' opinion, it seems to us, squarely meets the expression in the opinion of the court that the exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction being vested in the Federal district court, "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it," limits the power of the states to legislate on the subject

where such legislation attempts to give a remedy unknown to the common law. He cites case after case to show that such could not be the case. We need allude to only one—*American S. B. Co.* v. *Chase,* 16 Wall. 522, where a statutory remedy for causing death was enforced by the state courts and approved by the Supreme Court of the United States, though that death was caused by a collision on the high seas.

Justice Pitney—whose opinion is worthy of "the grander days of the Fathers,"—indulges in no flights of fancy, but to use one of Justice Holmes' adjectives, by "ineluctable" logic it seems to us, demolishes the decision of the majority of the court. He frankly states that up to the present decision he did not suppose it was open to doubt that the reservation to suitors of the right of a common-law remedy had the effect of reserving at the same time the right to have their common-law actions determined according to the rules of common law or state statutes modifying those rules. He quotes Chief Justice Marshall in United States *v.* Bevans, 3 Wheat. 336, "Congress may pass all laws which are necessary and proper for giving the most complete effect to this power (i. e. full and unlimited exercise of admiralty and maritime jurisdiction). Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of the sovereignty not yet given away," and Justice Clifford in *American S. B. Co.* v. *Chase,* supra, "State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the circuit courts as well as in the state courts."

He meets the arguments as to need for uniformity of adjudication by quoting instance after instance and case after case where state legislation in matters relating to interstate commerce prior to the action of Congress, as that subject has been sustained by the supreme court, although the Constitution contains an express grant to Congress to regulate interstate and foreign commerce. We cannot forbear quoting at some length his conclusion, "Surely it cannot be that the mere grant of judicial power in admiralty cases, with whatever general authority over the subject-matter can be raised *by implication,* can, in the absence of legislation, have a greater effect in limiting the

legislative powers of the states than that which resulted from the *express* grant to Congress of an authority to regulate interstate commerce,—the limited effect of which, in the absence of legislation by Congress, we already have seen. The prevailing opinion properly holds that, under the circumstances of the case at bar, although plaintiff in error was engaged in interstate commerce, and the deceased met his death while employed in such commerce, the provisions of the Federal Employers' Liability Act (April 22, 1908, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657) do not apply, because they cover only railroad operations and work connected therewith, whereas the deceased was employed upon an ocean-going ship. In effect it holds also that, in the absence of applicable legislation by Congress, the express grant of authority to regulate such commerce, as contained in the Constitution, does not exclude the operation of the state law. It seems to me a curious inconsistency to hold, at the same time, that the rules of the maritime law exclude the operation of a state statute without action by Congress, although the Constitution contains no express grant of authority to establish rules of maritime law, and the authority must be implied from the mere constitutional grant of judicial power over the subject-matter; and, most remarkable, that this result is reached in the face of the fact that the judicial power in cases of admiralty jurisdiction has been put into effect by Congress subject to an express reservation of the previous concurrent jurisdiction of the courts of law over actions of this character. This, besides ignoring the reservation, gives a greater potency to an implied power than to a power expressly conferred. * * * It results that if the constitutional grant of judicial power to the United States in cases of admiralty and maritime jurisdiction is held by inference to make the rules of decision that prevail in the courts of admiralty binding *proprio vigore* upon state courts exercising a concurrent jurisdiction in cases of maritime origin, the effect will be to deprive the several states of their police power over navigable waters lying wholly within their respective limits and of their authority to regulate their intrastate commerce so far as it is carried upon navigable waters." No wonder Justice Pitney speaks of the "momentous consequences" of this decision.

Fortunately the great tribunal whose majority has now made this decision the law of the land, has a way of getting rid of "momentous consequences" when they loom up largely on future occasions.

Conflicting State and Federal Legislation—The Workmen's Compensation Acts Again.

We recommend to those interested in the subject of federal regulation of employers and employees engaged in interstate commerce to the Second Edition of the admirable work of our former Associate Editor, Richey's Federal Employers' Liability, Safety Appliance, and Hours of Service Acts, by Mr. McBride, a present Associate Editor. Never was a book more needed, never has there been more litigation of modern times in as brief a time, as there has been upon these acts. One can not pick up a law report or periodical without finding case after case, state and federal, arising out of these acts. In the Advance Sheets, July 1, 1917, No. 15, U. S. S. C. L. Co-op. Pub. Co., there are seven cases passing upon these acts. One we have just commented upon. Another *New York Cent. R. Co.* v. *Winfield,* 37 S. Ct. 546, passes upon the same New York Workmen's Compensation Act which was under discussion in the case of *Southern Pac. Co.* v. *Jensen,* only this time there was no question of maritime law. J. J. Brandeis and Clarke dissent in this case, which held that the New York Workmen's Compensation Act could not award damages to an employee who was injured or to his family where he was killed, while such employee was engaged in interstate commerce, such award being prevented by the Federal Employers' Liability Act, even though that act gives the right of recovery only when the injury results in whole or in part from negligence attributable to the carrier. Winfield lost an eye whilst employed in what was interstate commerce by the New York Central Railroad Company, but without any neglect on the part of that company, it being an unavoidable accident.

Under the New York law he was entitled to compensation—negligence or no negligence. His award of damages under that act was sustained by the Supreme Court and Court of Appeals

of New York. The Supreme Court of the United States reversed these courts, holding as we have heretofore stated. It was contended by Winfield's counsel that the Federal act confined an award for damages purely and simply to acts caused by negligence, and therefore left to the states the right to deal with injuries not caused by negligence. The Railroad Company upon its side contended that the act covered both classes of injuries and is exclusive as to both. The State decisions upon this point are conflicting. The New York Court in the present case, and the New Jersey case of Winfield *vs.* Erie R. Company, 88 N. J. L. p. 619, hold that the act relates only to injuries resulting from negligence; whilst the California Court in Smith *v.* I. A. Commission, 26 Cal. App. 560, and the Court in Staley *v.* Ill. C. R. Company 268 Ill. 356, hold that it has a broader scope and makes negligence a test—not of the applicability of the act but of the carrier's duty of obligation to respond pecuniarily for the injury. The Supreme Court sustained the latter view, but Justice Brandeis and Justice Clarke dissented. Mr. Justice Brandeis' dissenting opinion will be read with much interest, not only for the clear way in which he presents the opposite view from the majority of the court, but because he sets out a history of the act and comments very clearly upon the origin of the act, the scope of the act, the purpose of the act, the need of Workmen's Compensation Acts, the methods and importance of Workmen's Compensation Laws, and draws the conclusion that Federal and State legislation are not in conflict. This dissenting opinion is of so much interest and value that we propose to publish it in the next issue of the REGISTER, space unfortunately lacking in the present number.

Illegal Transportation of Ardent Spirits — Evidence: Forcible Search of Person.

We see very often here lately in the public press accounts of the seizure of persons with grips which on being searched are found to contain ardent spirits, and the person carrying the grip is generally haled off to prison and convicted. The Federal law having now taken charge of such transportation between states, we may expect cases

in the Federal as well as in the state courts. Any decision, therefore, bearing on this subject becomes interesting.

Of course no officer has the right to make an arrest for a misdemeanor not committed in his presence, without a warrant, and a citizen may resist such an arrest even to the point of slaying the would be arrestor. *Moscoe's Case,* 86 Va. 443.

The question then arises as to the right to convict such a transporter of ardent spirits upon evidence thus obtained. In South Carolina a man bought liquor, put it in his grip, locked the grip and checked it into a county into which it was illegal to transport liquor. He was arrested, his person searched, the key forcibly taken from him, without any warrant whatever. The lower court, in which he was tried directed an acquittal and the Supreme Court of the State sustained the judgment. Town of Blacksburg *v.* Audie Beam, 88 S. E. 441, L. R. A. (N. S.), 1916E, p. 714. The court held that the forcible taking of the key was illegal and that a conviction under such circumstances would have been illegal, and we believe the court was right. In these days when people seem to have gone "a little daft" on the subject of ardent spirits, wine and beer, the calm sober language of Judge Gage is worthy of careful consideration as well by "dry" men as by "wet" men. "Some things," says the Judge in delivering the opinion of the court, "are to be more deplored than the unlawful transportation of whisky; one is the loss of liberty. Common as the event may be, it is a serious thing to arrest a citizen, and it is a more serious thing to search his person; and he who accomplishes it, must do so in conformity to the laws of the land. There are two reasons for this; one to avoid bloodshed, and the other to preserve the liberty of the citizen. Obedience to law is the bond of society, and the officers set to enforce the law are not exempt from its mandates. In the instant case the possession of the liquor was the body of the offense; that fact was proven by a forcible and unlawful search of the the defendant's person to secure the veritable key to the offense. It is fundamental that a citizen may not be arrested and have his person searched by force and without process in order to secure testimony." There was no flight by the defendant, and therefore no pursuit by the officer, and the Act of 1908 gives no power to search the person. "It is better that

the guilty shall escape, rather than another offense shall be committed in the proof of guilt." These words are not without value in the present condition of affairs.

In the note to this case several cases, taking an opposite view, are cited. The Supreme Court of Georgia in Calhoun *v.* State (1916) 144 Ga. 679, takes the opposite view and yet holds that "if the accused be compelled to produce the incriminating evidence, the evidence will be rejected as being in the nature of an involuntary admission." It is hard for us to see the difference between "compelling" a man to take his keys out of his pocket or holding him fast whilst another does it, and the logic of the Georgia Court evidently has a "false middle" somewhere. But then logic and liquor never went together and logic and liquor laws and decisions seem to have caught the same complaint.